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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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MAY 20 2005
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U. S. DISTRICT COURT
EASTERN MICHIGAN

GREGORY TROTTER,

Case No. 04-72673

Plaintiff,

DISTRICT JUDGE
ARTHUR J. TARNOW

v.

DR. JEROME WISNESKI, et. al.

MAGISTRATE JUDGE
WALLACE CAPEL, JR.



Defendants.
_____ /

**ORDER ADOPTING REPORT AND RECOMMENDATION [53].
GRANTING IN PART AND DENYING IN PART DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT [11, 13, 21, 28] AND DENYING
AS MOOT DEFENDANTS' MOTION FOR PROTECTIVE ORDER [58]**

On February 25, 2005, Magistrate Judge Capel issued a report and recommendation recommending that Defendants' motions to dismiss be granted in part and denied in part. The parties filed objections to the report and recommendation. The Court has considered the parties' pleadings, the report and recommendation, as well as the parties' objections.

As to Plaintiff's claims against Dr. Antonini, the Court agrees with the R&R that Plaintiff failed to exhaust his administrative remedies as required by 42 U.S.C. § 1997e.

The R&R recommends denying the remaining defendants' motions for summary judgment to the extent they rely on § 1997e through the "total

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exhaustion” rule. The Court notes that subsequent to the filing of the R&R, the Sixth Circuit issued an opinion in *Jones Bey v. Johnson, et al.*, ---F.3d---, Case No. 03-2331 (6th Cir. April 27, 2005), holding that the PLRA requires complete dismissal of a prisoner’s complaint when the prisoner alleges both exhausted and unexhausted claims.

In *Jones Bey*, Judge Clay authored a separate opinion concurring in part and dissenting in part. According to Judge Clay, the decision in *Jones Bey* is a nullity to the extent it conflicts with the earlier precedent of the Sixth Circuit, established in *Hartsfield v. Vidor*, 199 F.3d 305 (6th Cir. 1999), where the court implicitly rejected the total exhaustion rule. *See Jones Bey*, slip. op. at 8.

The Court agrees with Judge Clay’s concurrence in *Jones Bey*. Therefore, the Court will decline to follow the total exhaustion rule and will ADOPT the report and recommendation as to the exhaustion issue. *See also Hubbard v. Thakur*, 344 F.Supp.2d 549 (E.D. Mich. 2004) (Lawson, J.).

The Court has considered Plaintiff’s claims against the remaining defendants on the merits, and agrees with the analysis contained in the R&R as to such claims. Therefore,

IT IS HEREBY ORDERED that the Report & Recommendation is ADOPTED and entered as the findings of the Court;

IT IS FURTHER ORDERED that Dr. Antonini’s motion to dismiss [11] is GRANTED for failure to exhaust under 42 U.S.C. § 1997e;

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IT IS FURTHER ORDERED that Dr. Royster's motion to dismiss [11] is GRANTED;

IT IS FURTHER ORDERED that Defendants' Ribesky, Hamilton, and Fager's motion for summary judgment [28] is GRANTED;

IT IS FURTHER ORDERED that Defendant Dr. Wisneski's motion for summary judgment under Fed. R. Civ. P. 56 [21] is GRANTED

IT IS FURTHER ORDERED THAT Defendants' motion for protective order [58] is DENIED AS MOOT.

SO ORDERED.


Arthur J. Tarnow
United States District Judge

Date:

MAY 20 2005